WALTER KNOTT

v.

CHEW SWEE LOON INDUSTRIES SDN. BHD.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 617 OF 1982]
12 FEBRUARY 1983

CIVIL PROCEDURE: *Injunctions - Application to dissolve interim mandatory injunctions.*

DAMAGES: *Enquiry as to damages - Whether may be ordered at time of dissolution of injunctions.*

The plaintiff obtained interim injunctions, pending determination of their action, restraining the defendants from continuing to manufacture and from distributing for sale certain types of grinding stones and wheels and from passing them off as being manufactured under the licence of the plaintiff or in accordance with DSA standards. The defendants applied for a dissolution of the injunctions.

Held:

[1] Since the Statement of Claim was exhibited to the affidavit, it formed part of it. [*Palaniappa Chettiar v. Tan Jan & Anor.* [1965] 1 MLJ 182].

[2] The affidavit, on the strength of which the injunctions were granted, was insufficient-

(i) The crucial date for determining the question of violation of the plaintiff's rights was the date when the injunctions were obtained and therefore the sufficiency of the affidavit and the Statement of Claim called for scrutiny. [*Re Munns and Longden* [1884] 32 WR 675].

(ii) The plaintiff's contention that the defendants use the brand name "Sudflex" was quite untenable as it was based on a fundamental misconception. The defendants clearly had a discretion whether or not to use that brand name.

(iii) The affidavit did not show that the defendants had been placing on the market discs which were defective or not up to standard. The sources of information were not named. Such an affidavit was open to the objection that it was irregular and therefore inadmissible as evidence.[*In re J.L. Young Manufacturing Co. Limited* [1900] 2 Ch 753].

(iv) There was no evidence to show what if any loss was caused to the plaintiff by the defendants' activities or that the acts complained of constituted a breach of their obligation to the plaintiff under their agreement.

[3] The instant case was neither exceptional nor rare to justify the grant of an interim mandatory injunction. The plaintiff had failed to show that there was a high degree of assurance that at the trial a similar injunction would be granted. [*Wah Loong (Jelapang) Tin Mine Sdn. Bhd. v. Chia Ngan Yiok* [1975] 2 MLJ 109].

[4] The plaintiff would be adequately compensated by an award of damages were he to succeed at the trial in obtaining a permanent injunction. [*Tan Suan Choo v. Majlis Perbandaran, Pulau Pinang,* Penang High Court Civil Suit 445/82 (Unreported)].

[5] The balance of convenience favoured the defendants, who would be more at risk if the injunctions were allowed to remain in force. In any event, there would be better prospects for the plaintiff recovering the moneys allegedly due to him should he succeed at the trial if

the defendants were allowed to resume their business operations. [*Potters Ballottini v. Weston Baker*, The Time 28 February 1976 CA, and 2 Current Law, item 293(b); *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396].

[6] Material facts had been withheld by the plaintiff from the Court and the injunctions may be set aside without regard to the merits of the case. [*Bees v. Woodhouse.* [1970] 1 WLR 586; *Castelli v. Cook* [1849] 7 Hare 89; *Daglish v. Jarvie.* [1850] 2 Mac & G 231].

[7] The pleas of breach of confidence had no relevance in the case. The common or equitable obligation of confidentiality was displaced by specific contractual provisions. [*Coco v. A.N. Clark (Engineers) Ltd.* [1969] RPC 41].

[8] An enquiry before the Senior Assistant Registrar should be held to ascertain whether the defendants had sustained any and what damages by reason of the injunctions granted which the plaintiff ought to pay according to his undertaking contained in the order. An application for an enquiry as to damages may be made at the time of dissolution of the injunction and the Court has a discretion whether or not to grant it. [*Smith v. Day* [1882] 2 Ch D 421].

[Application allowed.]

Cases referred to:
Canadian Pacific Railway v. Gaud [1949] 2 KB 239
Gale v. Abbott [1862] 6 LT 852
Shepherd Hoover v. Sandham [1971] Ch 340
Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn. Bhd. [1982] 1 MLJ 260
Astro Exito SA v. Southland Enterprise [1982] 3 All ER 335
Hounslow London Borough Council v. Twickenham Garden Development Ltd. [1971] Ch 233
Art Trend v. Blue Dolphin (Pte.) Ltd. & Ors. [1983] 1 MLJ 25; [1983] CLJ (Rep) 985
Ross v. Buxton [1888] WN 55
Ushers Brewery Ltd. v. P.S. King & Co. (Finance) Ltd. [1971] 2 All ER 468
Harman Pictures NV v. Osborne [1967] 1 WLR 723

Legislation referred to:
Supreme Court of Judicature (Consolidation) Act 1925 [UK], s. 45
Evidence Act 1950, ss. 91, 92, 144

For the plaintiff - N. Ramachandran; M/s. N. Ramachandran & Co.
For the defendants - N. Chandran; M/s. Presgrave & Matthews

JUDGMENT

Edgar Joseph Jr J:

This was an application by the defendants for an order dissolving the interim mandatory injunctions ("the injunctions") contained in the order of the High Court, Kuala Lumpur, dated 27 August 1982 ("the order") which was obtained by the plaintiff upon *ex parte* application supported by the affidavit of his agent, one Eric Knott, affirmed to on 20 August 1982 ("the affidavit").

It is well settled that a mandatory injunction is a very exceptional form of relief [*Canadian Pacific Railway v. Gaud* [1949] 2 KB 239 at 240] and is rarely granted as an interlocutory measure. The tendency of Courts is to prefer to hear evidence on both sides before compelling positive action on the part of a defendant thereby requiring him to undo what he has done [*Gale v. Abbott* [1862] 6 LT 852]. There is also authority for saying that when the final result of the case cannot be known and the Court has to do the best it can, the case has to be "unusually sharp and clear" before a mandatory injunction will be granted, even if it is sought to enforce a contractual obligation: *Shepherd Hoover v. Sandham* [1971] Ch 340. On the other

hand, where it appears appropriate to do so, I see no reason why a Court should not grant an interlocutory mandatory injunction to enforce a contractual obligation especially since it has been held by the Federal Court in *Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn. Bhd.* [1982] 1 MLJ 260 that para. 6 of the Schedule to the **Courts of Judicature Act 1964,** is equivalent to s. 45 of the English **Court of Judicature (Consolidation) Act 1925;** [see *Astro Exito SA v. Southland Enterprise* [1982] 3 All ER 335, 346h to 347j]. However, should there be any doubts that at the trial a similar injunction would be granted, the interlocutory application is bound to fail: *Hounslow London Borough Council v. Twickenham Garden Development Ltd.* [1971] Ch 233.

With the above principles in mind, I turn to examine the facts of this case.

Specifically, the order which the plaintiff applied for, and obtained, was in the following terms.

> ... that the defendants Chow Swee Loon Industries Sdn. Bhd. be restrained until after judgment in this action or until further order from doing in the meantime whether by itself or by its Directors, servants or agents or any of them or otherwise howsoever the following acts or any of them that is to say:
>
> (1) from continuing to manufacture and distributing for sale the various types of resin bonded grinding stones and grinding wheels which they are manufacturing including those being distributed under the brand names of 'Crown', 'Diamond' and 'Star'.
>
> and (11) from stating or passing off that such grinding stones and wheels are being manufactured under licence of the plaintiff or in accordance with DSA standards.

The evidence upon which the plaintiff relied in obtaining the injunctions appear sufficiently from the affidavit and, for the sake of convenience, I shall reproduce it, shorn of introductory and formal parts:

Affidavit

1. ...
2. ...
3. As stated in the Statement of Claim the defendants are manufacturing resin-bonded abrasive discs and placing them on the market under the Brand Names "Crown" and "Star".
4. These discs are being manufactured and sold by the defendants in breach of the agreement (terminated on 20 February 1981) entered into between the plaintiff and the defendants and are in violation of the plaintiff's rights and constitute an infringement by the defendants of the plaintiff's name, reputation and goodwill.
5. Purchasers of these products i.e. those of the defendants' manufacture and bearing the Brand names "Crown" and "Star" have been falsely led to believe that such discs are manufactured under licence of the plaintiff and the same are made under the supervision of the plaintiff.
6. One purchaser of the products from Australia named Ex-Im Machinery & Merchandise on becoming aware of the breach and termination of the agreement wrote to the plaintiff a letter which omitting formal parts reads as follows:

> RE: **"Crown" Abrasive Cut-off & Grinding Wheels manufactured by Messrs. Chew Swee Loon Industries, Penang.**
>
> We have just learnt that some time last year you terminated your agreement with the above company for the manufacture of Resin Bonded Abrasive Discs. This news has come to us as a complete surprise because over the last three years or four months we were under the impression that Messrs. Chew Swee Loon were manufacturing the wheels under licence from your company and the wheels were made under your strict supervision and control conforming to West German standards.

In some way we are happy to have come to know of this unfortunate situation at this early stage since we were testing the wheels and had approached a few leading hardware merchants to get feed back information regarding quality and pricing.

We have now completely abandoned the idea of marketing "Crown" brand wheels because our company can ill-afford to associate itself with products that do not comply with safety and quality standards.

We are writing this letter to clarify our position.

7. Sometime in July 1982, I caused to be carried out a survey on dealers/retailers of abrasive discs in Malaysia.

8. One of the persons conducting the survey named Eddy Thean Pak Thong called on Messrs. Kwan Chong Engineering Sdn. Bhd. a dealer/user of abrasive discs.

9. Mr. Eddy Thean reported to me as follows:

On Monday 26 July I was shown by Mr. Chan the purchasing officer of Kwan Chong Engineering Sdn. Bhd. 312, Batu Tiga, Sg. Besi, Selangor, an abrasive Disc 7" x ¼" x 7/8" (1124) depressed Centre bearing the trade mark "Crown" and stated to be manufactured by the defendants. Mr. Chan complained that it was of such poor quality that he was compelled to reject all abrasive discs manufactured by the defendants.

I then showed Mr. Chan a product manufactured by Sunflex Abrasive Pte. Ltd. Singapore under licence of the plaintiff. The moment Mr. Chan saw the words "Made under licence of Suedflex Schleifmittel" he said that he would have nothing to do with any products made or manufactured by or under licence of the plaintiff because of his experience with the abrasives manufactured by the defendants.

10. The defendants are releasing on the market various abrasive discs claiming them to have been produced under licence of the plaintiff under the brand names "Crown" "Diamond" and "Star" and have also been releasing on the market discs with no mention of the plaintiff's name.

11. In the minds of the end users and retailers any abrasive discs manufactured by the defendants are being associated with the plaintiff.

12. Thus the continued manufacture by the defendants of abrasive discs are causing embarrassment and loss to the plaintiff especially as he is proposing to manufacture abrasive discs in association with a local company participating in place of the defendants.

13. The plaintiff has established a plant in Singapore under the name of Sunflex Abrasives Pte. Ltd. in association with Singapore manufacturers.

14. The discs manufactured in Singapore and those proposed to be manufactured in Malaysia indicate on their labels and they are manufactured under licence of the plaintiff.

15. As end users in Malaysia associate the plaintiff's name with the Discs placed on the market by the defendants the plaintiff and his new associated companies will suffer irreparable loss and damages.

16. The defendants have no right to manufacture any abrasive discs using the plaintiff's machinery or machinery with component parts copies for the machine installed by the plaintiff and unless restrained by the Court, the defendants will continue to manufacture such abrasive discs causing much loss and damage to the plaintiff as aforesaid.

It was submitted, and I agree, that since the Statement of Claim was exhibited to the affidavit it therefore formed part of it: [*Palaniapppa Chettiar v. Tan Jan & Anor.* [1965] 1 MLJ 182]. I have therefore taken both these into consideration in deciding this application.

Mr. Ramachandran for the plaintiff submitted that the gist of his complaint was that the plaintiff's rights had been and are being violated. This was so because the defendants were producing competing products not up to DSA standards and putting them on the market in consequence of which end users and retailers associate the plaintiff with these products, thus causing irreparable loss and damage to the plaintiff's name, reputation and goodwill. This submission was based upon alleged breaches by the defendants of Clause 2(c) of Article IV of the Know How Agreement which was in the following terms:

> (c) not to manufacture himself nor distribute and not to permit third parties to manufacture or distribute on his behalf any competing products covered by this agreement.

The words "Competing products" are nowhere defined in the agreement but Mr. Ramachandran had this to say, and I quote him:

> Any competing products means any discs that do not bear the name 'Sudflex' and not produced according to strict DSA Standards and any discs which say that they are made by the defendants without reference to the plaintiff's name 'Sudflex'.
>
> The defendant also commits a breach if he places on the market discs bearing the words 'Sudflex' and according to DSA standards of West Germany if the discs are not up to such standard.
>
> In other words the moment the plaintiff produces discs as he has done under the brand names 'Crown', 'Star' and 'Diamond' without mentioning 'Sudflex' or the other words he is "manufacturing himself" within the meaning of this clause and has committed a serious breach of the agreement and a serious breach of confidentiality. The plaintiff is entitled to an injunction on both aspects of the breach for manufacturing himself and for breach of confidentiality.

From the various submissions made by Mr. Chandran in support of the application, I am able to distill five grounds upon which he relies and these may be stated thus; first, that there was insufficient material before the Court for granting the same; second, that this was not an exceptional and rare case justifying the grant of an interim mandatory injunction; third, the plaintiff would be adequately compensated by an award of damages were he to succeed at the trial; fourth, the balance of convenience favoured the defendants rather than the plaintiff; fifth, there was non-disclosure of material facts. I shall take each of these grounds in turn.

Was the affidavit, on the strength of which the injunctions were granted, insufficient?

The first point to note is that the crucial date for determining this question is the date when the injunctions were obtained; that is to say, 27 August 1982: [*Re Munns and Longden* [1884] 32 WR 675]. It is, therefore, the sufficiency of the affidavit and the Statement of Claim which call for scrutiny.

Looking at these, I must ask myself whether there is any evidence showing a violation of the plaintiff's rights as contended by Mr. Ramachandran. Neither the main contract nor the Know How Agreement which were in writing, being dated 2 November 1979 and 5 December 1979, respectively, and referred to in the Statement of Claim, upon which the plaintiff relies to establish the alleged violation of his rights, were exhibited to the affidavit. I regard this omission as serious since ss. 91, 92 and 144 of the **Evidence Act 1950,** render inadmissible oral evidence of the contents of written documents in the absence of exceptional circumstances none of which were even alleged to exist.

However, it is unnecessary to decide this application on such a narrow and somewhat technical ground as both the main contract and the Know How Agreement are now before me.

In the first place, I fail to see how the defendants can be said to be violating the plaintiff's right by manufacturing and placing on the market grinding discs which bear the brand names 'Crown', 'Star' or 'Diamond' as alleged in paras. 3, 4, 10, 12 of the Statement of Claim. Clause 5 of Article II of the Know How Agreement (p. 82) clearly confers a discretion on the defendants whether or not to use the brand name "Sudflex" - specifically, it reads as follows:

> The LICENSER shall **allow** the LICENSEE to use his technical knowledge and the brand name of
>
> 'SUDFLEX'
>
> and shall **allow** the LICENSEE to mention that the PRODUCTS are manufactured under the licence of 'SUDFLEX' West Germany and are in accordance with the conditions and Safety Code of DSA (Deutscher Schleifscheiben Ausschuss, Hannover)."
>
> (Emphasis supplied)

It follows, therefore, that Mr. Ramachandran's contention (See p. 11 plaintiff's Principal Submission) that it was agreed that the defendants use the brand name "SUDFLEX" is based on a fundamental misconception and is quite untenable.

In the second place, it is necessary to consider if the affidavit shows that the defendants have been placing on the market discs which are not up to standard (para. 1 plaintiff's Principal Submission) or defective (para. 17 Statement of Claim). It is noteworthy that the affidavit does not even allege this though the Statement of Claim does. I would however have expected at least a verification as to the truth of contents of the Statement of Claim in the affidavit but none appears therein. Be that as it may, I shall now proceed to consider the facts of the plaintiff's case on the assumption that such verification is implicit in the affidavit.

Paragraph 6 of the affidavit mentions and reproduces purported extracts from a letter from Australia from M/s. Ex-Im Machinery & Merchandise, an alleged purchaser of the defendants' products, without exhibiting it or accounting for its non-production. Clearly, these purported extracts are inadmissible in view of the provisions of s. 144 of the **Evidence Act 1950.** But even if they were admissible, the extracts do not show that M/s. Ex-Im Machinery & Merchandise was a purchaser. The writer merely says that his firm or company had approached a few leading hardware merchants to get feed back information regarding quality and pricing, so whatever conclusions which this party may have reached as to the quality of the goods were not based on his own knowledge and his sources of information have not been named. This may protect the identity of the informant but such an affidavit is open to the objection that it is irregular and therefore inadmissible as evidence: *In re J.L. Young Manufacturing Co. Limited* [1900] 2 Ch 753.

Similarly, paras. 7 to 9 of the affidavit claims that one Mr. Eddy Thean carried out a survey on dealers and retailers of abrasive discs in Malaysia and reported back to him: (a) that one Mr. Chan Kow Chai, a purchasing officer of M/s. Kwan Chong Engineering Sdn. Bhd., had shown him (Mr. Thean) an abrasive disc bearing the trade mark "Crown" and complained that it was of such poor quality that he was compelled to reject all abrasive discs manufactured by the defendants: (b) that upon being shown by Mr. Thean a product manufactured by Sunflex Abrasives Pte. Ltd., Singapore, under the licence of the plaintiff, Mr. Chan allegedly replied he would have nothing to do with any products made or manufactured by or under licence of the plaintiff because of his experience with the abrasives manufactured by the defendants.

It is not clear if this report was in writing or verbal. If it was in writing then this part of the affidavit is open to the same criticism as para. 6. In any event, it is hearsay twice removed, and what is more, is flatly contradicted by Mr. Chan Kow Chai in his affidavit affirmed to on

13 September 1982. The contents of this part of Mr. Eddy Thean's report is an out of Court statement, attributed to Mr. Chan, and can therefore only be used, if at all, to impeach Mr. Chan's credit if and when he gives evidence at the trial. It can on no account constitute substantive evidence.

I accordingly conclude that the affidavit does not show that the defendants have been placing on the market discs which are not up to standard or defective.

In the third place, it is necessary to consider whether there was any evidence to show that the plaintiff has suffered any irreparable loss and damage to his name, reputation and goodwill by reason of the defendant's trading activities. Strictly speaking, this part of the plaintiff's claim does not require consideration in view of my finding that in manufacturing and distributing goods bearing the brand names "Star", "Crown" and Diamond" the defendants had not acted in contravention of provisions of the main contract or the Know How Agreement and my further finding that there was no evidence that the defendants had placed on the market discs which are not up to standard or defective. However, for the sake of completeness, I shall proceed to consider these other issues as well.

It seems to me, that to make out a case under this part of his claim, the plaintiff must show

(1) that he had a reputation, name and goodwill in the field of abrasive discs (para. 17 Statement of Claim; para. 4 of the affidavit.)

(2) that end users associated the Crown & Star brands with the plaintiff, thus causing confusion which in turn is likely to cause buyers to buy the defendants' goods in the belief that they are the plaintiff's (paras. 5, 6, 8, 9, and 11 of the affidavit)

(3) that, in consequence, the plaintiff has suffered embarrassment, irreparable loss and damage (paras. 12 and 15 of the affidavit of Eric Knott).

I am unable to find any evidence that the plaintiff has a reputation in the field concerned in this country. The ownership of that reputation must be proved. The Common Law sets its face against the recognition of a monopoly right. That principle is important since we are not here concerned with any registration under statute of a trade mark or design.

Similarly, I can find no evidence to support the averment that end users associate the Star, Crown & Diamond brands with the plaintiff. I have already dealt with the Australian letter and Eddy Thean's report which Eric Knott claimed he received and explained why I do not consider that they in any way help the plaintiff's case. The bald statements by Eric Knott that in the minds of end users and retailers any abrasive discs manufactured by the defendants are associated with the plaintiff is destitute of evidentiary value.

There is nothing to show what qualifications or experience Mr. Eric Knott has to speak about the beliefs, attitudes and knowledge of substantial numbers of the public who are purchasers or potential purchasers of abrasive discs. In his affidavit there is nothing to show that he is a competent witness in this respect. Even the plaintiff himself has not sworn any affidavit to support Mr. Eric Knott.

As to the third ingredient of this part of the plaintiff's case, there was no evidence tendered to show that if any loss was caused by defendants' trading activities.

It is also alleged in the Statement of Claim (paras. 3 and 4), though not in the affidavit, that the plaintiff agreed to sell and the defendants agreed to buy machinery and equipment for the manufacture of various types of resin-bonded grinding stones and grinding wheels and that the components of this machinery were designed and manufactured by the plaintiff and

not available in the open market and that the plaintiff claims exclusive rights over such designs and manufacture. It was further alleged (para. 18) that the defendants had installed an additional machine with parts unlawfully copied from component parts supplied by the plaintiff.

Assuming there was evidence that the defendants had done what is complained about, I fail to see how this constitutes a breach of their obligation under the agreement. In this connection Mr. Ramachandran has referred to Article X of the Main Contract which reads:

> The Seller reserves the ownership and copyright of all drawings, specifications and other data, which are handed over to the Buyer. They shall not be made available to third parties without written approval from the Seller, otherwise the Seller shall have the right to demand that all drawings, specifications and other data be returned upon first request.

No doubt this forbids the defendants from making available to third parties drawings, specifications and design, but I fail to see how it forbids the defendants from making use of material for their own purposes. I now turn to consider the second ground put forward on behalf of the defendants.

Whether This is an Exceptional and Rare Case Justifying the Grant of an Interim Mandatory Injunction?

Without in any way attempting to prejudge the issue, it is my opinion, that a powerful argument can be mounted by the defendants at the trial, that in view of certain provisions of the Know How Agreement, particulars whereof appear at p. 2, para. 5 of the defendants' Principal Submission, "the plaintiff has no case whatsoever to restrain the defendants from continuing to do what they have been empowered by the Agreement to do." If I am right in this, it must follow that the final result of the case cannot be known and is far from "sharp and clear,"or, at any rate, is at least "in doubt," and, as I have said in the second paragraph of this judgment, in such a situation the application for a mandatory injunction is bound to fail. For this, and other reasons I have mentioned when discussing the first ground relied upon by the defendants, I find that the instant case is neither exceptional nor rare to justify the grant of an interim mandatory injunction: [*Wah Loong (Jelapang) Tin Mine Sdn. Bhd. v. Chia Ngan Yiok* [1975] 2 MLJ 109].

I now turn to consider the third ground put forward on behalf of the defendants.

Whether the plaintiff would be Adequately Compensated by an Award of Damages were He to Succeed at the Trial in Obtaining a Permanent Injunction?

Next, even if the plaintiff has surmounted the problem of showing that there is a high degree of assurance that at the trial a similar injunction would be granted (and I find he has failed to do so), he has to go further and demonstrate that damages would not be an adequate remedy. As I said in *Tan Suan Choo v. Majlis Perbandaran, Pulau Pinang,* Penang High Court, Civil Suit 445/82 (Unreported)

> "Even assuming there is a serious question to be tried or that she has a real prospect of succeeding she must also show that damages would not be an adequate remedy."

I think there may be substance in Mr. Chandran's submission that the only reason why the plaintiff sought the injunctions is because he claimed that the defendants had not kept to the payment schedule as appearing in Article IV of the Know How Agreement. It has been alleged by Chew Swee Han, the Chairman of the defendant Company, in para. 8 of his affidavit affirmed to on 15 September 1982, and not challenged or contradicted by the plaintiff, that the defendant Company is incorporated under the Companies Act with a paid up capital of

RM250,000. It has been submitted (and this too has not been challenged by the plaintiff) that for this reason the plaintiff's claims, if successful, could be recovered from the defendants. On this further ground also the defendants are entitled to an order dissolving the injunctions.

I now turn to consider the fourth ground put forward on behalf of the defendants.

Whether the Balance of Convenience Favours the plaintiff or the defendants?

It was also submitted on behalf of the defendants that if the injunctions were allowed to continue the results would be catastrophic to them as they have already closed down their factory. Mr. Chandran has informed me from the Bar, and this was not challenged, that estimated losses have run to RM200,000, and about ten of the factory staff have had their services terminated whilst the services of another ten have been suspended and these are on half pay, though there is a promise to take them back should the defendants resume operations.

I am satisfied that these facts are sufficient to make the principles enunciated in *Potters Ballottini v. Weston Baker*, The Time 28 February 1976 CA; 2 Current Law, item 293(b) applicable. In that case the Court of Appeal held that although the plaintiffs had a *prima facie* case for the grant of an interim injunction, since there were serious questions of fact and law arising from the defence and the grant of the injunction would be catastrophic to the defendants such relief would have to await the trial notwithstanding the fact that if the plaintiffs succeeded at the trial they might not be able to recover proper compensation by way of damages from the defendants for the alleged breach of their rights. So, applying the test of balance of convenience, which Lord Diplock emphasized in *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396 would ultimately depend upon the facts of the particular case, I find as a fact that more would be at risk for the defendants if the injunctions were allowed to remain in force. In any event, there would be better prospects of the plaintiff recovering the moneys allegedly due to him, should he succeed at the trial, if the defendants are allowed to resume their business operations.

For the foregoing reasons, I have arrived at the firm conclusion that the injunctions contained in the order should be dissolved. I now have to consider the fifth and last ground relied upon by the defendants, namely, nondisclosure of material facts.

Was there Non-Disclosure of Material Facts by the plaintiff?

Mr. Chandran argued that there was non-disclosure of material facts by the plaintiff in respect of three matters: first, because the plaintiff had asserted through his agent Eric Knott that there was due termination of the Know How Agreement whereas in fact there was nothing of the sort; second, that the plaintiff had asserted that the defendants had defaulted with payments of certain instalments (para. 21 Statement of Claim) whereas this was not so; third, that certain statements attributed to Chan Kow Chai, the Purchasing Officer of M/s. Kwong Chong Engineering Sdn. Bhd., to which I have earlier adverted when dealing with the first ground for dissolution of the injunctions, namely, the sufficiency of the affidavit, were in fact not evidence as Chan Kow Chai had repudiated these statements.

Amplifying his submission, as regards the first point, Mr. Chandran pointed out that the case for the plaintiff as presented to the Court when the injunctions were sought may be stated thus:

(1) that there was due termination of the Know How Agreement following breach by the defendants of the provisions as to payment in the Know How Agreement.

(2) that the defendants were therefore not entitled to continue to manufacture, and,

(3) so the defendants were guilty of unauthorised user of the brands "Crown", "Star" and "Diamond", and guilty of infringing the plaintiff's trade mark or of passing off their goods for that of the plaintiff, to the detriment of the plaintiff.

Amplifying his submissions as regards the second point, Mr. Chandran pointed out that there was the affidavit of Phillip Heinrich Ludwig Hinrichs, the plaintiff's agent, affirmed to on 13 September 1982, supported by contemporaneous documents exhibited thereto (which incidentally were neither challenged nor contradicted by the plaintiff by affidavit) that the claims made by him were misconceived and there were discrepancies in material particulars.

As regards the third point, Mr. Chandran had dealt with this when arguing the question of the sufficiency of the affidavit.

On the other hand, Mr. Ramachandran submitted, as regards the first point, namely, the issue of due termination of the contract, that this was of no real importance as the gist of the plaintiff's case was that his rights were being violated. He did not however dispute the defendants' submission that there was no termination of the contract by the plaintiff. Nor for that matter does he appear to have seriously disputed the other two points upon which Mr. Chandran relied to establish the plea of non-disclosure. I would however add that I have not overlooked the general strictures passed against Phillip Heinrich Ludwig Hinrichs in paras. 2 and 3 of the second affidavit of Eric Knott affirmed to on 18 September 1982, but I fail to see how these are of any assistance to the plaintiff.

I find Mr. Ramachandran's submission on the point as to due termination of the contract quite untenable. The plaintiff himself relied on the averment that there was such termination both in the Statement of Claim and in the affidavit and I cannot feel confident that had this averment been omitted, he would still have succeeded in obtaining the injunctions. I therefore consider the non-disclosure was in respect of a material fact.

As regards the other two points relied upon by Mr. Chandran to show non-disclosure of material facts, I venture to say that common sense will supply the answer to this question. Here I can say that I do feel confident that had the facts relating to them been disclosed, as they undoubtedly should have, it is most probable that the plaintiff would have failed to obtain the injunctions.

I might add that there was in my view a fourth item of non-disclosure and that concerned the Main Contract and the Know How Agreement neither of which was exhibited to the affidavit. In my view they were most material for reasons which I gave when considering the sufficiency of the affidavit and whether this is an exceptional and rare case justifying the grant of an interim mandatory injunction.

It is well settled law that a party applying *ex parte* for an interim injunction should show utmost good faith and that the doctrine of *uberrimae fidei* applies by analogy: Per Davis, LJ in *Bees v. Woodhouse* [1970] 1 WLR 586. For this reason, where, as here, material facts have been withheld, the injunctions may be set aside without regard to the merits of the case: *Castelli v. Cook* [1849] 7 Hare 89; *Daglish v. Jarvie* [1850] 2 Mac. & G. 231.

I therefore hold that on this further ground also the defendants are entitled to succeed.

Whether the Plea of Breach of Confidence has any Relevance in This Case?

At the hearing before me a new and alternative ground was put forward on behalf of the plaintiff to justify the continuance of the injunctions. This was based on the plea of breach of confidentiality. It was said that the plaintiff developed a formula of his own for the manufacture of resin-bonded grinding discs and supplied the defendants with drawing,

training, machinery and other aids including a list of suppliers of raw materials for the manufacture of these discs. It was then said that the defendants are manufacturing grinding discs on their own behalf and are in breach of the agreement. All I need say here is that I think as little of this argument as apparently Counsel for the plaintiff did in the High Court at Kuala Lumpur where he never raised it. I would however add that the Common Law or equitable obligation of confidentiality was in this case displaced by specific contractual provisions. No less an authority than Megarry J (as he then was) had this to say in *Coco v. A.N. Clark (Engineers) Ltd.* [1969] RPC 41:

> Of the various authorities cited to me, I have found Saltman Engineering Co. Ltd., and Seager of the most assistance. I think it is quite plain from the Saltman case that the obligation of confidence may exist where, as in this case, there is no contractual relationship between the parties. In cases of Contract, the primary question is no doubt that of construing the contract and any terms implied in it. Where there is no contract however, the Question must be one of what it is that suffices to bring the obligation into being and there is a further question of what amounts to be a breach of that obligation.

In the course of the argument before me Mr. Ramachandran suggested that I should disregard this passage, although in his Principal Written Submission he had relied on it. Be that as it may, no reason was vouchsafed as to why I should do so. In my opinion, however, it does not help but only hinders the plaintiff's case.

Conclusion:

In the event, I ordered that the injunctions should forthwith cease to have effect. I further ordered that the costs of this application were to be paid by the plaintiff to the defendants in any event, that there was to be a speedy trial and that there should be an enquiry before the Senior Assistant Registrar of this Court to ascertain whether the defendants had sustained any, and what damages, by reason of the injunctions granted which the plaintiff ought to pay according to his undertaking contained in the order.

That, however, is not the end of the matter because after I pronounced my decision earlier this week with an intimation that I would be giving my reasons in writing shortly Counsel for the plaintiff wrote to Counsel for the defendant with a copy to the Court, saying, that in his view the order for an enquiry as to damages was premature as the plaintiff may still succeed in obtaining an injunction at the trial. In my opinion, an application for an enquiry as to damages may be made at the time of dissolution of the injunction and the Court has a discretion whether or not to grant it: [*Smith v. Day* [1882] 2 Ch D 421]. In this case, after hearing Counsel on both sides (and I should add Counsel for the plaintiff did not object except that he said that the enquiry should be before me rather than the Senior Assistant Registrar), I exercised my discretion in favour of the defendants because I was satisfied that the injunctions were improperly obtained by reason of non-disclosure of material facts: [*Art Trend v. Blue Dolphin (Pte) Ltd. & Ors.* [1983] CLJ (Rep) 985; *Ross v. Buxton* [1888] WN 55; *Ushers Brewery Ltd. v. P.S. King & Co. (Finance) Ltd.* [1971] 2 All ER 468, 474 para. f]. I also made no order that the enquiry should stand over, as the plaintiff was a foreigner whose undertaking as to damages was not reinforced by payment into Court. [*Harman Pictures NV v. Osborne* [1967] 1 WLR 723].

Also found at [1983] 2 CLJ 39